

HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

WICKFIRE, LLC,

Plaintiff,

v.

TRIMAX MEDIA, INC., *et al.*,

Defendants.

No. 2:15-cv-00827-RSL

**SURREPLY IN OPPOSITION TO
BRANDVERITY'S MOTION TO
STRIKE**

Related Case: U.S. District Court for the
Western District of Texas, Austin Division,
Case No. 1:14-CV-34

Noted for Motion Docket
Wednesday, May 27, 2015

Pursuant to its request to file a surreply [Dkt. No. 13], TriMax Media, LLC ("**TriMax**") files this surreply in opposition to BrandVerity, Inc.'s ("**BrandVerity**") Motion to Strike (the "**Motion**") [Dkt. No. 10].¹ In BrandVerity's Motion, filed alongside its Reply Memorandum on May 22, 2015, BrandVerity requests that the Court strike TriMax's opposition in its entirety because it was filed two days late. The Court should deny BrandVerity's Motion because TriMax's delay was a result of excusable neglect.

Courts do not punish parties for missing deadlines due to "excusable neglect." *See, e.g.,*

¹ Or, alternatively, TriMax files this surreply as a Motion to Strike BrandVerity's Motion to Strike under Local Rule 7(g)(2).

1 *PLU Investments, LLC v. Intraspex Grp., Inc.*, No. C10-626RSL, 2011 WL 1376192, at *1
 2 (W.D. Wash. Apr. 12, 2011); *Bender v. Colvin*, No. 3:13-CV-05957-KLS, 2014 WL 2589683,
 3 at *3 (W.D. Wash. June 10, 2014) (“If the claimant can establish good cause for missing the
 4 deadline, the time period will be extended.”). “To determine whether neglect is excusable, the
 5 Supreme Court has stated that the test ‘is at bottom an equitable one, taking account of all
 6 relevant circumstances surrounding the party’s omission.’” *In re Um*, No. C14-5593 BHS,
 7 2015 WL 106347, at *2 (W.D. Wash. Jan. 7, 2015) (citing *Pioneer Inv. Services Co. v.*
 8 *Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395 (1993)). “These circumstances include:
 9 (1) the danger of prejudice to the debtor [or to the nonmoving party]; (2) the length of the delay
 10 and its potential impact on judicial proceedings; (3) the reason for the delay, including whether
 11 it was within the reasonable control of the movant; and (4) whether the movant acted in good
 12 faith.” *Id.*

13 **A. Prejudice to the Nonmoving Party**

14 TriMax’s two-day delay in filing its opposition caused no prejudice to BrandVerity;
 15 indeed, BrandVerity has not even alleged injury or prejudice in its Motion to Strike.
 16 Furthermore, BrandVerity has already filed its substantive reply. *Armstrong v. Cnty. of Kitsap*,
 17 No. C04-5461 RBL, 2006 WL 3192518, at *2 (W.D. Wash. Nov. 2, 2006) (“Defendants move
 18 to strike Plaintiffs’ summary judgment response as untimely. . . While Defendants’ timeliness
 19 arguments are properly noted, this Court will not strike Plaintiffs’ claims, especially when
 20 Defendants filed a substantive reply.”).

21 **B. Length of Delay**

22 The length of the delay was only two days. *Cf. Knight v. Wal-Mart Stores, Inc.*, No.
 23 C08-5746RJB, 2009 WL 4544734, at *2 (W.D. Wash. Nov. 25, 2009) (excusing the plaintiff’s
 24 five-day delay that was due to counsel’s calendaring error).

25 **C. Reason for Delay and Good Faith**

26 TriMax’s opposition to BrandVerity’s Motion to Quash was due on Monday, May 18,

1 2015. LCR 7(d)(3). Two days before this due date, on Saturday, May 16, 2015, TriMax's lead
 2 attorney — who had been handling the daily management of the case as well as all third-party
 3 discovery efforts — unexpectedly and suddenly took an immediate leave of absence from the
 4 law firm due to an unfortunate family crisis. This situation has created significant difficulties
 5 for TriMax in all aspects of the case. To wit, TriMax has already filed a Motion to Amend the
 6 Scheduling Order in the underlying case. *See Exhibit 1.*

7 Furthermore, in the wake of this attorney's unexpected departure, and the ensuing
 8 confusion as TriMax's remaining counsel diligently rushed to fill the void, TriMax's counsel
 9 mistook the Motion to Quash to be a second Friday motion (Wednesday deadline) rather than a
 10 third Friday motion (Monday deadline), and did not obtain pro hac vice admission until
 11 Wednesday, May 20, the day it filed its Response. The Court, however, has found this type of
 12 error to be excusable, even under ordinary circumstances. *See Knight v. Wal-Mart Stores, Inc.*,
 13 No. C08-5746RJB, 2009 WL 4544734, at *2 (W.D. Wash. Nov. 25, 2009) (finding excusable
 14 neglect where counsel misread the timing in the rules).

15 For the foregoing reasons, TriMax respectfully requests that the Court deny
 16 BrandVerity's Motion to Strike, and consider TriMax's opposition brief on its merits.

17
 18 DATED this 27th day of May, 2015.

19 GARVEY SCHUBERT BARER

20
 21 By /s/ John Crosetto
 22 John Crosetto, WSBA #36667

-and-

/s/ Peter L. Vogel

Peter S. Vogel

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CERTIFICATE OF SERVICE

I, Jill M. Beagle certify that on May 27, 2015, I caused a copy of the foregoing to be served upon the following by the means indicated.

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DATED this 27th of May, 2015.

GARVEY SCHUBERT BARER

/s/ Jill M. Beagle

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